

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

DEC 02 2011

ARMAND DEUBER, : CONSOLIDATED UNDER
 : MDL 875
Plaintiff, :
 :
 : Transferred from the
 : District of New Jersey
v. : (Case No. 10-02686)
 :
 :
ASBESTOS CORPORATION LIMITED, :
ET AL., : E.D. PA CIVIL ACTION NO.
 : 2:10-CV-78931-ER
Defendants. :

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this **2nd** day of **December, 2011**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant Warren
Pumps, LLC (Doc. No. 93) is **GRANTED**.¹

¹ This case was originally filed on March 10, 2010 in the Superior Court of New Jersey, Middlesex County. It was removed by Defendant CBS Corporation to the United States District Court for the District of New Jersey on May 25, 2010. It was thereafter transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875. Decedent Armand Deuber worked as a rigger (in a civilian capacity) at the Philadelphia Naval Shipyard for approximately 5 years (1967 or 1968 to 1973) and thereafter worked at DuPont in Deepwater, New Jersey for approximately twenty-three (23) years. Mr. Deuber developed mesothelioma and died. The alleged exposure with respect to Defendant Warren Pumps took place exclusively at the Philadelphia Naval Shipyard.

Plaintiff has brought claims against Defendant Warren Pumps, alleging that its products were a cause of decedent's mesothelioma. Warren Pumps has moved for summary judgment, arguing that (1) maritime law applies (and suggesting that if maritime law does not apply, then New Jersey law applies), (2) Plaintiff has failed to provide product identification evidence sufficient to establish causation with respect to its products (under either maritime law or New Jersey law), and (3) it is entitled to the bare metal defense (under either maritime law or New Jersey law). Plaintiff contends that Pennsylvania law

applies (or possibly New Jersey law) and asserts that maritime law is not applicable.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

Warren Pumps asserts that maritime law is applicable with respect to its motion. Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. See In re Asbestos Prods. Liab. Litig. (Oil Field Cases), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., - F. Supp. 2d -, 2011 WL 3101810 (E.D. Pa. July 22, 2011) (Robreno, J.). A party seeking application of maritime law must establish that maritime jurisdiction is properly invoked.

Id. at * 5.

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. Id. at * 5-8 (discussing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. Id. In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. See Sisson, 497 U.S. 358 (1990). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in Conner) is land-based work. The connection test requires that the incident could have "a potentially disruptive impact on maritime commerce," and that "the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 2011 WL 3101810 at *9. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will meet the connection test necessary for the application of maritime law. Id. at 9-10. But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. Id.

In instances where there are distinct periods of different types (e.g., sea-based versus land-based) of exposure, the Court may apply two different laws to the different types of exposure. See, e.g., Lewis v. Asbestos Corp., Ltd., 10-64625, doc. no. 81 (Aug. 2, 2011 E.D. Pa.) (Robreno, J.) (applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

It is undisputed that the alleged exposure to Defendant Warren Pumps's products occurred exclusively during the decedent's work at the Philadelphia Naval shipyard (for a period of approximately five (5) years). Defendant has specifically asserted that the decedent's work at this shipyard was aboard ships docked there, and has produced extensive deposition testimony of decedent and a co-worker that indicates that the work performed there and resulting in the alleged exposure was work done aboard the docked ships (as opposed to in other areas of the shipyard not on the ship). Although Plaintiff has asserted in its brief that "Mr. Deuber's injury did not occur on navigable water" and that "[t]he vessels at issue were being constructed at the Philadelphia facility where Mr. Deuber worked as a civilian rigger," it is clear from the deposition testimony of decedent himself, along with the deposition testimony of his co-worker, that the alleged exposure occurred aboard ships docked at the shipyard and, thus, was sea-based work. See Sisson, 497 U.S. 358. Therefore, Warren Pumps has satisfied its burden in establishing that maritime law is applicable to the claims against it, and thus to its motion. See Conner, 2011 WL 3101810, at *5.

Maritime law is made up of an amalgam of federal and state law. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986). Substantive admiralty law applies to products liability claims. Id.

C. Product Identification / Causation

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 F.App'x 371, 375 (6th Cir. 2001). Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F.App'x. at 375.

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" Id. (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F.App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988) (citing Restatement (Second) of Torts, § 402A (1965))).

II. Defendant Warren Pumps's Motion for Summary Judgment

Defendant Warren Pumps argues that it is entitled to summary judgment because Plaintiff has failed to produce sufficient product identification evidence from which a jury could conclude that the decedent was exposed to its product or that its product was a substantial factor in the development of Mr. Deuber's mesothelioma. Specifically, Warren Pumps asserts that there is "no evidence" that the decedent worked on or around a pump manufactured by Warren Pumps or was otherwise exposed to respirable asbestos fibers from a pump manufactured by Warren Pumps because, during his deposition, decedent (1) did not recall the names of any pumps from which he removed asbestos, and (2) did not identify Warren Pumps as a manufacturer of any pump he worked with or around. Warren Pumps also argues that the testimony of coworker John DiTroia is meaningless with respect to the claims against it because it does not place the decedent near its pumps. In the alternative, Warren Pumps argues that, even if decedent was exposed to asbestos from its pumps (i.e., component parts associated with its pumps), it is still entitled to summary judgment on grounds of the bare metal defense.

In response, Plaintiff points to testimony from the decedent and a co-worker (Mr. DiTroia) about rip-out work performed by them aboard the USS Luce and USS Saratoga during the course of overhauls. The testimony pertinent to Defendant Warren Pumps is as follows:

Decedent's Testimony

Q: Do you remember when you began your work in the Philadelphia Navy yard?

A: I don't know, '67, '68 or something like that.

Q: **How long were you a rigger while you were at the Philly Navy Yard?**

A: **The whole time.**

Q: Did you have the same responsibilities as a rigger the entire time you were there?

A: Yes.

Q: Generally, **what were those responsibilities as a rigger at the Navy yard?**

A: **It was the rigger's duties, jobs, to move machinery and reinstall - the ship - can I elaborate?**

Q: Yes. . . .

A: **When the ship came in for overhaul, they took everything out of it. They called it rip out, believe it or not. It was a rip out period.**

We took all of the machinery out ... sent them to different shops; and then gradually after a period of time, they start trickling back and we would reinstall.

Q: Okay.

A: That on an 18 - **two-year overhaul**, say a destroyer, guided missile ship or something.

Q: **So is it fair to say that as a rigger, you would be involved in the rip out of all the machinery on board a ship that came in for overhaul?**

A: **Yes.**

Q: **Do you believe that you came into contact with asbestos or asbestos-containing products while you were at the Philly Navy Yard?**

A: **Definitely.**

Q: How do you believe you came into contact with asbestos product during that time period?

A: **We used to beat asbestos off a machine with a hammer to get to it, to get to the lifting.**

Q: And who would do that?

A: We would.

Q: And how would you do that?

A: Like I said, a lot of times with a hammer, just to get the asbestos off the - **if you had to take the - if you had a pump** as big as this table and it had a rotor or

something in it and you needed the rotor inside ... we would take - **just beat all the asbestos off so we could take the cover off** and take the rotor out and send that.

Q: Do you know the trade name, brand manufacturer's name of any of these pumps?

A: It would be difficult for me to say yes.

Q: **Do you recall the names of any of the ships in which you were involved in overhauling as a rigger?**

A: **The Luce, USS Luce, L-u-c-e.**

Q: L-u-c-e. Okay. Do you recall the names of any other ships?

A: I wish I could, no.

Q: **By the way, did this ship come in for an overhaul?**

A: **The Luce did, yes.**

Q: Do you know when it came in for an overhaul?

A: No.

Q: **Do you remember how long it was at the yard for the overhaul?**

A: **Probably 18 months.**

(Dep. of decedent Armand Deuber (Vol. I), April 27, 2010, at 53:11-64:24, Ex. 1 to Doc. No. 93 (emphasis added).)

Q: Your first day of testimony when **you talked about the work you did at the Philadelphia shipyard**, you testified when - **there would be times when you would smack off asbestos insulation using a hammer**; is that right?

A: Yes.

Q: **You specifically testified about doing that type of asbestos insulation removal on pumps on the ships.** Right?

A: **Yes.**

Q: You talked about work that you performed on pumps on board the ships while working for the Philadelphia shipyard.

A: Yeah.

Q: Were there different pumps for different functions?

Q: **Would it be your responsibility as a rigger to work on all of the pumps on the ship?**

A: **If they had to be moved, yes.**

Q: During the course of an overhaul, where you told us about a hole being cut inside of a ship and machinery being taken out, would pumps be one of those types of machinery that would be taken out of the hole?

A: Yes.

Q: How many, if you can estimate or if you can tell me, how many different pumps would you have worked on during the course of an overhaul on the Luce?

A: I can't put a number on it, I can't recall.

Q: **Were the pumps that you worked on in one location or were they in different locations all over the ship?**

A: **Different locations in machinery space.**

Q: Okay. And when you worked on the Luce during the overhaul, did you work in the engine room?

A: **The engine room and the boiler room.**

Q: And the boiler room, was there a bilge pump room or a bilge room?

A: **The ship has a bilge and there's bilge pumps in each compartment.**

Q: **Did you work in that area at all?**

A: **Of course, yes.**

(Dep. of decedent Armand Deuber (Vol. II), April 29, 2010, at 295:6-305:1, Ex. 2 to Doc. No. 93 (emphasis added).)

Q: **What type of work did you perform on the USS Luce?**

A: We - It was like an 18 month, almost two year overhaul. We took everything out and sent it to the shops, all the machinery, all the pumps, all the - anything that was big had to be handled by the riggers, big valves, relief valves on boilers, a lot of booster pumps, fuel pumps, feed pumps, bilge pumps, all kinds of crap like that had to come out of the bilges out the top of the boiler, out the side of the hole of the ship.

Q: **And when you were performing work as a rigger during your overhaul on the Luce, do you believe you were exposed to asbestos?**

A: **Oh, yes.**

Q: And can you tell the jury how you were exposed to asbestos?

A: Well, there was some things that we had to get to that to get to this pump or whatever, feed pump, we would take the asbestos off with hammer, knock everything

off, just shoved everything aside and then the machinist could then unbolt the cover and the cover was flipped over and they might have put a new rotor in. . . . **Each ship had them in the same position and there were several of them.**

(Dep. of decedent Armand Deuber (Vol. III), May 6, 2010, at 27:25-29:13, Ex. 3 to Doc. No. 93 (emphasis added).)

Co-Worker's Testimony

- Q: Do you recall the years you worked with Mr. Deuber at the Philadelphia Shipyard?
- A: Not exactly.
- Q: Would you be able to provide us an estimate of the time frame in which you worked with Mr. Deuber?
- A: Sometime between 1966 and approximately 1980.
- Q: Did you ever have an opportunity to work as a rigger with Mr. Deuber at the Philadelphia Shipyard?
- A: More as an apprentice than a rigger.
- Q: When you were working as an apprentice, what was Mr. Deuber's job title or classification?
- A: He was a rigger first class?
- Q: So then as an apprentice would it be accurate to say your job was to assist him in rigging duties, learning the job or the trade?
- A: That is correct.
- Q: **As an apprentice assisting Mr. Deuber, could you describe for us exactly what your job duties were?**
- A: We assisted in all - **I assisted in** all phases of the assignment, whether it be hanging the gear, prepping for the gear removal, and then assisted **during the actual removal of the equipment.**
- Q: **When equipment was being worked on by yourself and Mr. Deuber, would any of that work take place in the engine room of ships?**
- A: **Yes.**
- Q: Did you ever have to do any **work on equipment in the boiler room of ships?**
- A: **Yes.**
- Q: During your work with Mr. Deuber performing rigging duties, did you ever have to do **any work on or around pumps?**
- A: **Yes.**

Q: Do you recall the names of any of the ships you worked on with Mr. Deuber?

A: Only a few of the larger ones. We worked on the **Saratoga** when it first came in around '68, on the battleship New Jersey when they recommissioned it, which was between '68 and '70. We worked on the Benua and the Carleton, we worked on the Farragut, I believe. I worked on some ships - it is hard to remember all of them.

Q: Do you recall working with Mr. Deuber on the Luce at all?

A: Yes.

Q: When you worked with Mr. Deuber on the **Saratoga**, can you describe for us the work that was being done on that ship?

A: That ship was having a complete overhaul from top to bottom so we worked in various spaces. Sometimes we were assigned to the engine room, fire room, other times we may be up in the super structure with the arresting gear or **electronics room**.

Q: Did you ever have to work in the boiler room on the **Saratoga**?

A: Yes.

Q: Focusing on the engine room of the **Saratoga**, could you describe for us the type of work you were doing at that time?

A: There was a complete rip-out. We removed various pieces of equipment and piping to include valves, **pumps**, et cetera, to be removed to send to the shop to be overhauled.

Q: Going to the work that you performed on the **Saratoga** in the boiler room, could you describe for us the work that was taking place in that area of the ship?

A: A lot of the same, **removal of** all the equipment, boiler overhauls, firebrick, mortar, boiler tubes, valves, **pumps**. Everything that was in the boiler room was to be removed for overhaul.

Q: I believe you also mentioned on the **Saratoga** that pumps were being removed?

A: Yes.

Q: Could you **describe the process** of the pump removal?

A: **Insulation around the pipes and flanges would have to be removed first.** Pipefitters would come in and do their thing. Mechanics would unbot from the foundations and we would remove the pump from the space and have it shipped over to the shop for refurbishing.

Q: **The process of cutting off this insulation, did that create dust?**

A: **Yes.**

Q: **Were you and Mr. Deuber present while this insulation was being cut creating the dust?**

A: **Yes.**

Q: And did that dust get on your clothes?

A: Yes.

Q: Did it get on Mr. Deuber's?

A: Yes.

Q: And do you believe you breathed in that dust?

A: Yes.

Q: **And do you believe Mr. Deuber breathed in that dust?**

A: **Yes.**

Q: **Let me ask you a general question here with regard to the Saratoga. While the dust was in the air from these various processes you testified to, did you witness Mr. Deuber breathing?**

A: **Yes.**

Q: **You saw him breathing in the engine room?**

A: **Yes.**

Q: **You saw him breathing in the boiler room?**

A: **Yes.**

Q: Do you recall **any other areas of the shp that you worked with Mr. Deuber on the Luce?**

A: **Pump rooms, electronic rooms.**

Q: What type of work were you performing with Mr. Deuber in the engine room of the Luce?

A: **Removal of unspecified equipment, pumps, motors, valves, piping, ventilation duct.**

Q: **Do you believe that any of the work involved in removing the pumps exposed you and Mr. Deuber to asbestos?**

A: **Yes.**

Q: How so?

A: **Removal of attached piping from those pumps were**

insulated. Some of that insulation had to come off to break bolts. Removed sections of pipe before the pump could be removed.

Q: During the course of having to remove these pumps, did the outer covering of the pump have to be removed?

A: Not all the time, no.

Q: **At any time did your job with Mr. Deuber involve working with any of the packing in the pump?**

A: **At times.**

Q: **What would you have to do with that packing?**

A: **We did not necessarily handle it, but we were in the vicinity of it.** The pump had to be removed, taken apart for whatever reason we would take it apart while **we were standing next to the machinist who would then remove any of the packing or gasket material.**

Q: Do you recall the names of any of the pumps on the Luce where this occurred?

A: No.

Q: **When the packing was removed from these pumps, did that create dust at all?**

A: **Some.**

Q: What type of work were you doing **in the boiler room of the Luce?**

A: Again, **removing equipment, pumps, valves, piping.** I don't recall if we did a boiler overhaul on that ship.

Q: Do you recall any **parts of the ships where you worked with Mr. Deuber?**

A: We worked in various areas, **engine room, pump rooms, boiler rooms, electronics rooms.** On those smaller **ships** you weren't assigned to a specific room so there was a group of riggers assigned to the ship and **we basically worked the whole ship.**

(Dep. of co-worker John Albert Ditroia, February 26, 2011, at 12:8-48:10, Ex. 1 to Doc. No. 115 (emphasis added).)

While the testimony of the decedent and the co-worker places the decedent frequently in the engine room and the machinery room of the USS Luce and USS Saratoga during work performed on pumps, the testimony does not identify the specific pumps which were present in these ships.

Plaintiff seeks to fill the gap by relying on the report of an expert (Captain Arnold P. Moore), who identified specifically the pumps manufactured by Defendant Warren Pumps as being present in the engine room and machinery room on the USS Luce and USS Saratoga while the decedent worked there, and as having contained asbestos.

Although Warren Pumps failed to raise this point in its briefing, it (along with other defendants) contended at oral argument that Plaintiff should not be permitted to rely on its expert evidence, as it was produced in a form that did not constitute "sworn testimony." In response, Plaintiff contended that counsel did not believe that an affidavit was required and instead believed that an expert report would be sufficient for purposes of opposing the summary judgment motion. See Tr. of Oral Arg. at 65-66. Because Plaintiff had an opportunity to respond and Plaintiff neither objected nor requested additional time to respond, the Court will consider this contention even though it was not previously raised in the briefing.

Federal Rule of Civil Procedure 56(c)(1)(A) provides that a party asserting that a fact is genuinely disputed must support that assertion with particular parts of material in the record, such as an affidavit or declaration. The United States Court of Appeals for the Third Circuit has found that an unsworn expert report "is not competent to be considered on a motion for summary judgment." Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1980)); see also Bock v. CVS Pharmacy, Inc., No. 07-CV-412, 2008 WL 3834266, at *3 (E.D. Pa. 2008) (refusing to consider an expert report when no sworn affidavit was provided with the report); Jackson v. Egyptian Navigation Co., 222 F. Supp. 2d 700, 709 (E.D. Pa. 2002) (finding that an unsworn expert report cannot be considered as evidence for a motion for summary judgment).

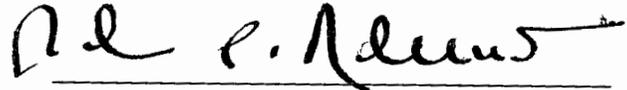
This Court has previously held that an unsworn expert report cannot be relied upon to defeat a motion for summary judgment. Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *6 (E.D. Pa. Oct. 20, 2010) (Robreno, J.) (citing Woloszyn v. County of Lawrence, 396 F.3d 314, 323 (3d Cir. 2005)). In Faddish, unlike this case, although the Court determined that the unsigned expert report could not be relied upon to defeat summary judgment, the Court instead relied upon deposition testimony of the expert, which the Court permitted, noting that such testimony is sworn testimony. In the case at

hand, given that the expert report submitted was merely signed and not supported by affidavits or sworn declarations, it is "not competent to be considered" in support of Plaintiff's Opposition to Defendant Warren Pumps's Motions for Summary Judgment. Fowle, 868 F.2d at 67.

It is true that Federal Rule of Civil Procedure 56 was amended effective December of 2010 to provide that a declaration, that is an unsworn statement subscribed to under penalty of perjury, can substitute for an affidavit. See Fed. R. Civ. P. 56 advisory committee's note; see also Ray v. Pinnacle Health Hosps., Inc., F.App'x, at 164 n.8 (3d Cir. 2010) (noting that "unsworn declarations may substitute for sworn affidavits where they are made under penalty of perjury and otherwise comply with the requirements of 28 U.S.C § 1746"). However, an expert report that is not sworn to under penalty of perjury or accompanied by an affidavit is not proper support in disputing a fact in connection with a motion for summary judgment. Burrell v. Minnesota Mining Manufacturing Co., No. 2:08-87293, 2011 WL 5458324 (E.D. Pa. June 9, 2011) (Robreno, J.) (refusing to consider expert reports when no timely sworn affidavits were provided with the reports and the reports were not sworn to under penalty of perjury). Because the expert report submitted by Plaintiff in this case was not sworn to under penalty of perjury, see 28 U.S.C. § 1746, the amendment to Federal Rule of Civil Procedure 56 does not save Plaintiff's expert report.

The Court further notes that, when given an opportunity to respond to Defendants' request that the Court not consider Captain Moore's expert report, Plaintiff did not seek leave of the Court to make a supplemental submission with an affidavit or to provide other sworn testimony (such as the sworn deposition testimony of the expert) in order to cure the deficiency. The justification given by Plaintiff's counsel was that it believed that an expert report was sufficient for purposes of the summary judgment motion and that an affidavit was not necessary. The Court rejects this justification for the failure to comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A), and notes again that the Court has previously ruled that an "unsworn statement" cannot be relied upon to defeat a motion for summary judgment. Accordingly, since Plaintiff did not comply with the requirements of Federal Rule of Civil Procedure 56(c)(1)(A), the expert report of Captain Moore is "not competent" to be considered in support of Plaintiff's Opposition to Defendant Warren Pumps's Motion for Summary Judgment.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

Without the expert report of Captain Moore, Plaintiff has no evidence that the pumps to which the decedent was exposed were manufactured by Defendant Warren Pumps or that any such pumps contained asbestos or asbestos-containing parts. Accordingly, as there is no product identification evidence pertaining to this Defendant, its motion for summary judgment is granted. In light of the Court's determination on this issue, it need not reach Warren Pumps's argument that it is entitled to the bare metal defense.